

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
ECHOSTAR SATELLITE CORPORATION)	File No. EB-00-IH-0014
)	NAL/Acct. No. X32080009
Licensee of Direct Broadcast Satellite System)	JJS

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 21, 2000

Released: March 22, 2000

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture, we find that EchoStar Satellite Corporation ("EchoStar") has apparently violated Section 335 of the Communications Act of 1934, as amended, 47 U.S.C. § 335, and Section 100.5(c) of the Commission's rules, 47 C.F.R. § 100.5(c), by failing, on December 15, 1999, to reserve four percent of its channel capacity for use by qualified programmers for noncommercial programming of an educational or informational nature. We conclude that EchoStar is apparently liable for a forfeiture in the amount of eleven thousand dollars (\$11,000).

II. BACKGROUND

2. In November 1998, the Commission adopted rules imposing certain public interest obligations on direct broadcast satellite ("DBS") providers. *See Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations, Report and Order*, 13 FCC Rcd 23254 (1998) ("*DBS Public Interest Obligations Order*"). Among other obligations, these rules require DBS providers to set aside four percent of their DBS systems' total channel capacity exclusively for programming of an educational or informational nature. The *DBS Public Interest Obligations Order* required DBS providers to make available satellite capacity for public interest programming on June 15, 1999, and provided an additional six months, or until December 15, 1999, for providers to enter into arrangements with interested programmers for delivery of public interest programming to consumers. *DBS Public Interest Obligations Order*, 13 FCC Rcd at 23309.

3. On November 24, 1999, the Commission held that EchoStar's proposal to place all of its public interest programming on its satellite at the 61.5° W.L. orbital location, which provides limited coverage of the United States, did not comply with the Commission's DBS public interest rules. *American Distance Education Consortium*, 14 FCC Rcd 19976 (1999) ("*ADEC Declaratory Ruling and Order*"). Instead, the Commission determined that EchoStar must set aside four percent of the channels available at each of its full-continental U.S. ("CONUS") orbit locations for public interest programming. Because the channel capacity at EchoStar's full-CONUS locations is less than the capacity of its entire

system, the Commission stated that EchoStar could place the remaining channels at the location of its choice.

4. On December 10, 1999, EchoStar filed a petition requesting that the Commission waive the December 15, 1999, implementation deadline and grant EchoStar an extension of six weeks, or until January 28, 1999, to begin offering its public interest programming. EchoStar claimed that additional time was needed due to Y2K date compliance concerns and the *ADEC Declaratory Ruling and Order*. On December 16, 1999, the Commission denied EchoStar's request for waiver. *EchoStar Satellite Corporation*, FCC 99-394 (released December 17, 1999). The Commission also noted that EchoStar had been on notice since November 1998 that it would have to reserve four percent of its channel capacity for public interest programming and make that programming available. *Id.* at ¶7. The Commission described EchoStar's reliance on the *ADEC Declaratory Ruling and Order* as "disingenuous." *Id.* With respect to EchoStar's Y2K concerns, the Commission held that EchoStar had sufficient time and notice to make programming available consistent with its Y2K preparations. The Commission went on to say:

Nonetheless, out of abundance of caution, and purely to protect consumers from the potential disruption of their service, we will not undertake enforcement action for failure to comply with this obligation from the time period of December 16, 1999 to January 7, 2000. We take this action sua sponte to protect the public interest and ensure that EchoStar customers and U.S. consumers will not suffer from EchoStar's failure to plan adequately to meet its obligations. We further emphasize that we do not absolve EchoStar from its failure to meet the December 15, 1999 deadline, and specifically put EchoStar on notice that it may be subject to enforcement action with regard to its apparent failure to comply with our rule.

Id. at ¶9.

5. On January 11, 2000, the Enforcement Bureau commenced an investigation into EchoStar's compliance with Section 335 of the Act and the Commission's implementing rules by sending EchoStar a letter of inquiry. EchoStar filed its response on January 27, 2000. The Bureau sent EchoStar a follow-up letter of inquiry on February 15, 2000, and EchoStar responded to that letter on March 1, 2000. In its response, EchoStar calculates its total channel capacity as 308.5 channels, using the formula contained in Section 100.5(c)(1) of the Commission's rules. EchoStar thus maintains that it was required to reserve and provide noncommercial programming on 13 channels (4% of 308.5, rounded up to the next whole number). On December 15, 1999, however, EchoStar was providing qualified noncommercial programming on only four channels: CSPAN, Eternal World Television Network, NASA Channel, and Trinity Broadcasting Network.¹

III. DISCUSSION

6. Section 335(b)(1) of the Act provides:

The Commission shall require, as a condition of any provision, initial authorization, or authorization renewal for a provider of direct broadcast satellite service providing video

¹ See Letter Dated January 27, 2000 from David K. Moskowitz, Esq., Senior Vice President and General Counsel, EchoStar Satellite Corporation to John J. Schauble, Special Counsel, Investigations and Hearings Division, Enforcement Bureau.

programming, that the provider of such service reserve a portion of its channel capacity, equal to not less than 4 percent nor more than 7 percent, exclusively for noncommercial programming of an educational or informational nature.

Section 100.5(c)(1) of the Commission's rules provides:

Reservation requirement. DBS providers shall reserve four percent of their channel capacity exclusively for use by qualified programmers for noncommercial programming of an educational or informational nature. Channel capacity shall be determined annually by calculating, based on measurements taken on a quarterly basis, the average number of channels available for video programming on all satellites licensed to the provider during the previous year. DBS providers may use this reserved capacity for any purpose until such time as it is used for noncommercial educational or informational programming.

By its own calculations, EchoStar was required to carry 13 channels of noncommercial programming of an educational or informational nature on December 15, 1999. It was carrying only four such channels on that date. EchoStar's conduct is an apparent violation of Section 335 of the Act and Section 100.5 of our rules.

7. Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), and Section 1.80(a) of the Commission's rules, 47 C.F.R. § 1.80(a), each state that any person who willfully or repeatedly fails to comply with the provisions of the Communications Act or the rules shall be liable for a forfeiture penalty. For purposes of Section 503(b) of the Communications Act, the term "willful" means that the violator knew it was taking the action in question, irrespective of any intent to violate the Commission's rules. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387, 4387-4388 (1991).

8. The Commission's *Forfeiture Policy Statement* does not provide a base forfeiture amount for the apparent violations in this case. Under Section 503(b)(2)(C) of the Act, 47 U.S.C. § 503(b)(2)(C), the maximum forfeiture that can be assessed against EchoStar for a one-day violation is \$11,000.² Section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), requires that the Commission consider "the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require" when assessing a forfeiture. In this case, we believe a forfeiture for the statutory maximum is appropriate. These provisions serve the extremely important purpose of ensuring that the public has access to diverse, quality programming. Moreover, as the Commission noted in denying EchoStar's waiver request, EchoStar had a more than adequate period of time within which to select and reach agreements with programmers prior to December 15, 1999. Finally, none of the circumstances EchoStar has presented to us support mitigation of the forfeiture. Accordingly, we find EchoStar apparently liable for an \$11,000 forfeiture.

IV. ORDERING CLAUSES

9. ACCORDINGLY, IT IS ORDERED pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Sections 0.111, 0.311 and 1.80 of the Commission's rules,

² The maximum figure contained in the text of the statute is \$10,000. Pursuant to the Debt Collection Improvement Act of 1996, Public Law 104-134 (110 Stat. 1321-358), the maximum has been adjusted for inflation up to \$11,000. *See* Section 1.80(b)(5)(iii) of the Commission's rules, 47 C.F.R. § 1.80(b)(5)(iii).

47 C.F.R. §§ 0.111, 0.311 and 1.80, that EchoStar Satellite Corporation is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of eleven thousand dollars (\$11,000) for willfully violating Section 335 of the Communications Act of 1934, as amended, 47 U.S.C. § 335, and Section 100.5(c) of the Commission's rules, 47 C.F.R. § 100.5(c).

10. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's rules, that within thirty days of the release of this Notice, EchoStar SHALL PAY to the United States the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

11. Payment of the forfeiture may be made by credit card through the Commission's Credit and Debt Management Center at (202) 418-1995 or by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the NAL/Acct. No. referenced above.

12. The response, if any, must be mailed to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-B443, Washington DC 20554 and MUST INCLUDE the file number listed above.

13. IT IS FURTHER ORDERED that a copy of this Notice shall be sent, by Certified Mail/Return Receipt Requested, to David K. Moskowitz, Senior Vice President and General Counsel, EchoStar Satellite Corporation, 5701 South Santa Fe, Littleton, Colorado 80120.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau